Capital Punishment:
to blot out from the catalog of the living[1]

At an earlier meetup, we considered the concept of knowledge and the problem of clearly marking it out from belief. It seems to many there is an irremediable element of luck involved in saying we *know* something. There is certainly no consensus among philosophers on how to do away with that element. The quest to do so is fascinating and engaging as an academic pastime, you might say, but when do we care that much about being so certain that we can't possibly be wrong or mislead? For all practical purposes, we know well enough when we know and when we merely believe. If the difference really comes down to just a matter of degree, we manage…

The 1865 hanging of Captain Henry Wirz in Washington, D.C.
(Wonder why it is sometimes misspelled "capitol" punishment?)

Unfortunately, there are situations where we ought to be more certain than is humanly possible—or risk making a mockery other pretensions we have. When we risk the lives of innocents merely to uphold a principle, at the very least we have a moral obligation to be *that* certain. If there are situations where the level of certainty morally required to carry out an action is beyond the reach of human capacity, and we are aware of it, and we fail to attend to this fact, then whatever reasons we have for proceeding with the action *they are not moral ones.* One such situation is the execution of someone who has been deemed not worthy to live by a penal system.

Part I
Why We Punish

First, we'll address punishment in general. What it is and why we say we do it? Then we'll look at the main arguments for and against capital punishment, specifically. Finally, by way of illustrating the point above about the level of certainty morally required, I will offer a defense of capital punishment that does the best we can do to uphold the most convincing motivation in favor of the punishment: *retribution*. I don't personally think we should execute people for any reason, but if there is a proper justification for doing so—a justification rooted in something fundamental to what it means to be human, for better or worse—this is it, I believe…

1. To paraphrase J. S. Mill slightly. He thought sometimes it was necessary on utilitarian grounds. Kant also thought sometimes people just ask for it and it would be disrespectful not to oblige them...

To punish is to authoritatively deprive someone of a preferred possession or experience which might be some degree of well-being, wealth, freedom or, in extreme cases, life.

Typical motivations given by authorities for deliberately inflicting one of these deprivations are one or more of the following:

1. Deterrence
2. Retribution
3. Incapacitation
4. Rehabilitation

It is the first two that seem to dominate discussion of the role of punishment in our mental economy. Not surprisingly, they correspond to the two leading moral theories we have discussed before: consequentialism and deontology.

Deterrence is the chief consequentialist justification for punishment. If punishment stops or, by example, inhibits others from emulating the convicted, then it is a good thing, or so the consequentialist would say. The simplicity of this approach, of course, is a good part of its appeal. It seems almost common sense that observing bad consequences follow on bad behavior for others would discourage us from behaving as they did.[2]

Retribution is the notion that a wrongdoer deserves punishment in the same way that one who does something constructive (e.g., work) deserves reward (e.g., pay). It is wrong not to grant what is deserved. This is derived from the deontological idea that we as rationally autonomous creatures choose our actions and as such are responsible for them. It is disrespectful of our humanity not to regard us in this way: it would be to treat someone as a damaged object or tool, or a sick animal. We don't *rationally* punish or reward animals or objects.[3] We *manipulate* or *use* them, as we would any aspect of our environment. Manipulation of the rationally autonomous is not moral from a deontological perspective. (Retribution has its roots in atavistic vengeance instincts. It essentially domesticates those instincts by tying them to our highest conception of ourselves as uniquely reason-guided beings.)

Incapacitation is the most immediate and pragmatic reason to punish. The idea makes no pretense of making an example for others, improving the malfeasor, or passing moral judgment. It is first aid practiced on a rent in the fabric of social order. As such it is the least controversial

2. Consequentialism can play a role in the justification for incapacitation and rehabilitation as well. There is also an interesting dynamic between these consequentialist-inspired reactions to crime: incapacitation may not deter except incidentally and at a very high price: it is like pain management rather treating an underlying cause—which may worsen ultimate outcomes: time spent incarcerated may be time spent training in criminality at public expense.

3. Though we may sometimes, rather erratically, treat animals and objects as though they were rationally autonomous. Consider what usually happens to a mountain lion with perfectly healthy instincts who kills and eats a child. Our behavior with regard to animals is revealing of what we would do to people without moral qualms. Perhaps we should have the same qualms about animals, but that's another subject.

and compatible (at least temporarily) with the other justifications.

Rehabilitation is motivated to recover to the community a stray: find out and correct, if possible, what went wrong in a person's life that led them to criminal behavior. It assumes that such persons are malleable and that society has the patience and concern to pursue this recovery. It also assumes, perhaps incorrectly, that society is not so invested in criminality *just as it is* that it only reluctantly wants it to stop.

There is another reason we punish that is sometimes cited in addition to those justificatory reasons noted above: the need to emphatically *express* our disapproval of certain behavior. But it is not clear that this expressive imperative is a reason for punishing as much as a cause of it. That would make it an anthropological fact about us: it is something we do. It describes a pattern of behavior we engage in that serves some individual or collective psychic need which we would demonstrate whether or not we could educe a reason for it. The stated reasons we offer may in fact be rationalizations, attempts to mollify our insulted rational pretensions. *Punishment-as-reflex* does not sit well with other pretensions we make surrounding our capabilities.

As punishments go, the death penalty is the supreme test of our moral convictions. That is why it gets attention from philosophers and all the major moral theories weigh in. But it is curious that, with the possible exception of moral sense theory, arguments based on the other theories—consequentialism, deontology, and virtue theory—can support either side on the contentious issue. We've already explained how consequentialism and deontology can offer moral backing to punishment in general, and the death penalty, in particular, has no features that cannot work with those theories. Even virtue theory (not one of the "big two") can conclude that well-proven vicious characters have no value to society, and society can do no wrong in eliminating them.

How might these accounts of ethics also serve the abolitionist cause?

No other than the first major consequentialist, Jeremy Bentham, opposed capital punishment on utilitarian grounds. His calculations simply came out differently. The good that comes of putting criminals to death just doesn't exceed the bad fallout he envisions. Deterrence, if it is even real, is not sufficient to outweigh the possibility of error and the general pandering to sub-human, brutal instincts that accompany the spectacle of death. Recall that in order to achieve its maximal deterrent effect, the penalty must be a spectacle, a sensational event—or word (or sight) of it won't reach those who need most exposure to it. Following this logic, the more brutal the punishment the better. Being stretched on a rack, drawn and quartered, burned at the stake, beheaded, crucified, etc.—all other things being equal—would be better deterrents than mere hanging or being subjected to firing squad, asphyxiation, electrocution, or lethal injection. What counts as "cruel and unusual" is a matter of historical fashion. It is a little odd that we seem to want to have it both ways: have it *not* be "cruel and unusual" and, *at the same time*, a deterrent for people who are cruel and unusual.

Bentham wavered a little on the punishment, though in the end he came down squarely against it. But his most famous student John Stuart Mill (who wrote the book on "utilitarianism," literally) gave a speech before Parliament defending the ultimate punishment, firm in the conviction that the utilitarian calculus worked out the other way:

> When there has been brought home to any one, by conclusive evidence, the greatest crime known to the law; and when the attendant circumstances suggest no palliation of the guilt, no hope that the culprit may even yet not be unworthy to live among mankind, nothing to make it probable that the crime was an exception to his general character rather than a consequence of it, then I confess it appears to me that to deprive the criminal of the life of which he has proved himself to be unworthy—solemnly to blot him out from the fellowship of mankind and from the catalogue of the living—is the most appropriate as it is certainly the most impressive mode in which society can attach to so great a crime the penal consequences which for the security of life it is indispensable to annex to it. I defend this penalty, when confined to atrocious cases, on the very ground on which it is commonly attacked—on that of humanity to the criminal; as beyond comparison the least cruel mode in which it is possible adequately to deter from the crime. *(Mill, speech before the British Parliament on April 21, 1868)*

The "least cruel mode"? I'm guessing he meant: as opposed to all manner of torture we might imagine…

Consequences being what they are—largely *empirical*—they are subject to the vagary of observation. If you attend to different consequences than I, we will conclude differently. So it should not surprise that consequentialism can swing both ways on the death penalty or punishment in general. The fact of the matter is that there is no consensus among social scientists as to whether punishment deters, even less whether the death penalty does. If there are clear indications that punishment deters, it seems to do better the less severe the infraction. Jaywalkers are more clearly deterred by strictly enforced fines (up to a point), than murderers are by capital punishment.

Deontology—Kant's version of it especially—is usually on the side of the death penalty. From this perspective, the punishment is, in an important sense, the constructed, if not actual, wish of the convicted. Nothing less than the just loss of his own life is what a rationally autonomous person could have intended at the time he committed the capital act for which he was convicted. The act itself of destroying another rationally autonomous being is the expression that one's own rational autonomy is of no value.[4] Or, in plain language, the killer "asks" to die.

4. Murder-suicides may result from an internalization of this ethic.

Of course, for Kant, the class of those who might be eligible for the death penalty is much smaller than for the consequentialist. A lot of things have to come together including some that must be completely in the control of the perpetrator of a capital act for the punishment to apply. The effect of the punishment on others beyond the perpetrator is always beside the point on deontological grounds. Even if the penalty promoted more, not fewer, similar crimes, that alone would carry no weight against it. The critical element in responsibility here is the act of willing a result. This is at least a necessary condition, if not always sufficient,[5] for responsibility.

Putting someone to death for the willful act of showing no respect for the life of another is a recognition of their humanity. It shows they were not merely pawns of their upbringing, social environment, or biological inheritance. And if it can be shown they were such pawns of the universe, this penalty cannot be entertained: thus animals, the insane, the retarded, children, or rational incompetents, in general, cannot be subjected to the penalty. One may not ever be fully responsible for much of what one actually does, but the formation of an individual act of will is always within our control, Kant believed. The universe might have conspired against us in every way, but, so long as we can be classed among the rationally autonomous, we are responsible for our acts.

There is another essential aspect of Kantian morality, however, that is often forgotten in this context. It stems directly from the first formulation of the categorical imperative which asserts that one is not permitted to have motivations that one would not be willing to universalize, that is, make available to any and every rational agent. One is never allowed to be a law unto oneself. I can never say that it permissible for me to act on a motive that I would not allow anyone else. Exceptionalism has no place in Kantian ethics, no matter the consequences. So if an innocent person is intentionally killed, the killer cannot say that the act is permitted for them but not for anyone. The Kantian imperative is adamant that there can be no exceptions to the moral law properly conceived. If it isn't universal, it isn't moral.

This anti-exceptionalism harbors the seed of an argument that may bring the death penalty to its knees on deontological grounds. Despite Kant.[6]

Part II

The Retributive Case

5. Not sufficient for legal responsibility. Whether it is sufficient for moral responsibility is a separate issue.
6. Kantian deontology is psychologically more sophisticated as moral theory than consequentialism. And it does theoretically inform retributivism, but it also makes very high epistemic demands that essentially undercut, on a practical level, the imposition of absolute judgments. It puts brakes on the finality of our decisions—something, it seems, Kant himself doesn't fully grasp in discussing this punishment, though he does in other moral contexts.

There is no clear moral justification for the death penalty on consequentialist grounds in my view. If there is, it is slight and well below the threshold necessary to convincingly counterbalance the consequentialist arguments against it. If it is only the happiness of the greatest number we seek, there are plenty more effective remedies toward that end that we might try—that is, were our motives not mixed and purely consequentialist. The fact is our motives must be quite mixed to judge from the ambiguity of our legal and penal institutions.

There is, however, a case to be made for the death penalty on purely retributive grounds. It is, I think, the only truly formidable argument because it is rooted in something that reflects an essential feature of human nature as momentous as the crime for which it is appropriate. But the argument is *theoretical*. As a practical matter, the argument *may* not be realizable, as we shall see...

The retributive case involves two principles. The first is that in unjustly taking the life of an innocent other like himself, a rationally autonomous agent knowingly (and so intentionally) forfeits a right to his own life. The practical morality of the situation allows us to construct the intention from the facts. Whether the perpetrator actually entertains the intention is irrelevant because it is not what *actually* went through his mind that counts morally. It is what *should* have passed through the mind of the agent under the circumstances, *given the kind of being he is: a rationally autonomous one.* Such beings are taken to be under a moral imperative to have intentions, and to be aware of their intentions and the direct logical consequences of their intentions.

The Kantian way of putting this would be to insist that—in showing ultimate disrespect for the rational autonomy inhering in a victim capable of it by taking the victim's life—one is thereby showing disrespect for what is the most valuable thing in the universe and worthy of the highest regard: *the fact that we are capable of rational agency.* One is, in the same act, repudiating one's own rational autonomy. One is voluntarily asking to be removed from the catalog of those worthy of existing.[7] And, as a last rationally autonomous act, this wish should be respected. It was a choice. *If* it was a choice… Murder is tantamount to suicide. (Note that Kant also thought suicide a wrong equal to murder for the same reason: rational agency is disrespected by succumbing to forces external to that agency. One's own suffering is external to it, hence no excuse.)

Again, non-rationally autonomous entities: inanimate objects, plants, animals, children, the mentally incompetent or ill, those deranged by incapacity or duress, that was not a result of their own choices, etc., do not meet the condition of being fully rationally autonomous and so the penalty cannot apply to them.[8]

7. To paraphrase Mill. Nowadays, he might have said "deleted from the database of the living," i.e., Facebook.
8. There is a case to be made that it doesn't apply to women either, not because they are not as capable of rationality but because the knack plays a different ethical role for them than it does for men. It is no accident that Kant himself

This is the main retributive principle. It is a refinement, you might say, of the more atavistic and deeply-seated human compunction to take great offense at acts that violate what is most dear to us: our life and that of those near us. It is rooted in *vengeance*—not to put too fine a point on it. But raw vengeance, as such, has long ago been repudiated as being indiscriminate. To civilize the impulse, we have come to insist on couching the offense as one to "human dignity." It is not suppose to be merely a reflex unmediated by the thing that makes us unique: our ability to reason and the crowning distinction it gives us.

The power of this argument is manifest in the influence it has in our penal system. It is deeply felt by very many to be unjust for someone to destroy a blameless human being without facing the direst consequences we can bring ourselves to inflict on them. The force of this goes beyond mere animal reflex. Even if we were to abolish the death penalty for other reasons, the depth of the offense to our humanity would not go away. (Hopefully, the force of the offense might be channelled in a more constructive direction, but there is precious little to make us believe that is likely in non-evolutionary time.)

This principle and the considerations it raises dominate Kantian or deontological discussions around the death penalty. Since no less than Kant himself strongly defended the penalty it seems to many that deontology's position is firmly pro-capital punishment.

But there is another critical retributive principle applicable here that is very clearly implied in Kant's formulation of the first categorical imperative: *act so that one's motive could become universal law.* The enemy of this principle is exceptionalism: the idea that I may get away with something that I am unwilling to allow to be a rule for all other rational agents. *As applied to capital crimes and their executors, Kant's principle would absolutely forbid that some killers of innocents be overlooked while other killers of innocents face the ultimate penalty.* (In the right circumstances, consequentialism wouldn't have any problem with this inequity.) We cannot say this or that person may kill an innocent while another may do the same without fierce consequences. *Every* unjust and willful killer of innocents must pay. *There can be no exceptions.* To permit that would be the gravest insult to morality. It would radically undermine the one thing morality must always have on its side (even when it may be powerless in the practical world), the thing it must ultimately be founded on *in order to command respect*. Central to that respect is impartiality.

There can be no exceptions. Innocents put to death by agents of the state require being executed themselves. Since a responsibility like that cannot be subcontracted, there remains the question whom we may allow to take on this responsibility? There *may be* someone with the right motivation and moral permission...

excused women from his ethics. No, it wasn't plain-Jane sexism. His moral theory is a cure for a disease that women typically do not get. But we'll leave this controversy for another time...

Part III

Giving teeth to convictions

So… here I quote at length, with the permission of the author, a portion of a longer piece on the subject of the death penalty by the philosopher Bianco Luno. Luno works out the proper protocol for processing capital crimes if the penalty is to have a credible moral foundation or, as he says, "we want to do capital punishment right"—and on Kantian terms.

> **A modest proposal to effect**
> **The Elimination of Champion Evil—doers**
> **from our midst while**
> **Preserving a Modicum of Moral Decorum**
>
> *Bianco Luno*

The idea is simple: that a *responsible* human hand carry out the last act that ends the life of a duly convicted perpetrator of a capital crime. Understood is that the criminal knew what he was doing, intended it, and was capable of doing otherwise (insofar as any of us are capable)—but did his crime anyway. Understood, also, is that a system of justice comprised of third parties has expended every effort to determine that the person to be executed is the same one that committed the crime. "Beyond a shadow of doubt," the dictum goes. *My suggestion will put teeth into that sometimes too lightly held conviction.*

The key word is "responsible." Here's what I take it to mean: that just as we are holding the duly convicted *responsible* for the heinous crime of robbing an innocent of their life we would hold *anyone* similarly responsible for a similar act. Including the executioner. The executioner is, morally speaking, in exactly the same position vis-à-vis the act of taking life as the original criminal. The original criminal, we must be assuming (otherwise why would we have found him guilty?), knew that his act would deprive another of life, knew that this is perhaps the greatest evil one human may visit upon another, and knew there would be a grave price to pay for it. He made his calculations as any rational agent, decided that it was worth doing, and did it. Perhaps in his calculations, he heavily discounted the possibility that he would actually have to pay the steep price. Or the enormity of it. Or even that, knowing full well all this, what he hoped to gain through the act or in the act itself was so great as to be well worth the risk of paying this price... After all, *aren't such lucid criminals precisely the ones for whom the punishment is designed and*

most justified? This is Kant's view: that this lucid criminal quite frankly implied through his desire to commit the crime the punishment that went with it. To desire one without the other is either irrational or the mark of rational incapacity (in the latter case, we shouldn't be talking about punishment at all). Irrationality and immorality are intimately connected. Otto Weininger put it most clearly when he wrote, "logic and ethics are one." So we honor the capital criminal's rationally expressed wish—we treat him as an end—in putting him to death for a crime that entails it. The penalty is defined by and entails death.

Robert Priseman, *The Gas Chamber*

Anyone in the position to put someone to death should know this. If there is a difference between the executioner's position and that of the original murderer it is that the original murderer knows, in most cases, that his victim is an innocent. Or does he? Perhaps, in the eyes of a third party the victim is innocent, but is it often the case that a cold-blooded murderer really believes his victim innocent? Again, we are concerned with lucid criminals in the context of capital crimes. So we must assume that our criminal doesn't blame his victim for anything in particular, may even admit the victim is as pure as driven snow. The victim's innocence is simply irrelevant to the murderer's purposes. The victim's life stands in the way of some goal or desire of the murderer. The bottom line is that the murderer has no special reason to raise the question of the innocence of his victim. So let the third party judgment on the matter fill this void: murderers' victims can be assumed to be innocent, and few, even murderers, will question this. For all the difference it makes to him, his victim is innocent.

The executioner, on the other hand, may seem in a different place with regard to the innocence of the one whose existence he is going to blot out. He is *assured* the murderer is *not* innocent. He is allowed to rest in the conviction that everything humanly possible has been done to guarantee this. In all overwhelming likelihood the convicted is guilty and is deserving of, even honored by, the punishment. Feeling himself in a different place, he may perhaps act to execute with less apprehension with regard to the morality of his act, assuming the original murderer himself suffered any. The executioner, after all, has the full juridical backing of the community which has apprehended, tried, convicted, and isolated the murderer. It has certified the conviction and now presented the executioner with all the trappings necessary to see that retributive justice is done. He need only push the button, flip the switch, or pull the lever and the closure demanded by so grievous a rent in the moral fabric that sustains us each in a community of rational agents is achieved…

So far so good.

But the executioner is also in the *same* place as the original murderer in this one *further* respect:

he is a member of the same greater community of rational agents to whom the law of retribution, insofar as it is morally justifiable, applies. Kill an innocent *unnecessarily* and you will forfeit your right not to be killed yourself. The lack of innocence in the one you kill must be a *true* lack, not just one so in your opinion or your opinion buttressed by evidence and the solidarity of your community. After all, a professional hitman who believes his victims guilty and whose criminal community backs him up in this judgment is not thereby relieved of *moral* responsibility should his victim actually be innocent. (He may even think that an occasional dead innocent is of little moment in the larger project of making sure *those who should be dead get dead.*) Kill one lacking in true innocence and you have done justice a service. Make a mistake and you have played Russian Roulette. If you, yourself, do not meet the same fate, it will be, as far as you are concerned, but for the grace of God.

An executioner must be very, very brave in the scheme I propose. If he pushes the button, flips the switch, or pulls the lever on the wrong person, he—the executioner—will be both in the same position *and* not in the same position as the original murderer.

The *same* insofar as he has killed an innocent—just as innocent as the original victim (for when it comes to *this* punishment there is no calibration of innocence) and, like the original murderer, the executioner *deserves* to die because he intended the killing of an innocent, never mind that the executioner *believed* the executed was not innocent, for this was manifestly not a situation of duress, *the one case where we excuse killing* or, at least, proceed with the fewest qualms. (Remember we are talking *moral* innocence, not the legal variety.)

Not in the same place in that there is this glaring *difference:* we have every reason to believe the executioner's act was *at least as, if not more so,* premeditated, as cold-blooded, as calculated as the years will permit, the years between the original murder and the execution—compassing the conviction, the appeals, the final certification of the highest authority, during which bureaucratic sluggishness conspires with "justice for all"—*to freeze the blood of all concerned*—in its concern to make sure no one acts in haste without ample opportunity for consideration, consideration, and reconsideration. When the executioner pushes the button, flips the switch, or pulls the lever he knows what he is doing. What he is doing is *taking a chance, however slight…*

Christopher Conte, Lethal Injection Attack Droid

…that the earthly machinery of justice has *not* erred. *His role is to act as guarantor of this.*

The executioner commits no crime if he refuses this—we could even say sacrificial, certainly, supererogatory—role. The duly convicted will rot in jail for life. Or until such time as a mistake, if there was one, is uncovered and corrected. The situation is one in which the convicted, through his act and conviction, has forfeited his right

to live. One may forfeit a right yet have it honored anyway. There may be *other* considerations in a community of rational agents apart from any right to live (or to die) he may have that will steer his fate…

Such considerations as: our executioner's right to express a wish not to stoop as low as the original murderer. His right to express the arrogance of having transcended a reflex, or his right to admit his reflexes are not strong enough. Or his right to instantiate a principle for the inspiration of others. Or his right to insist that he will not allow the act of another to define his actions and thereby his life for him. Or merely his right to finish living his life less this one risk...

The risk that, for all the surety of his community of rational agents, for all their faith in the thoroughness of their induction, they are wrong and this person is innocent. Even if that possibility alone did not frighten him in itself, there would yet be the prospect that his own life would be forfeit.

Our executioner, we propose, should have the option to avoid the bother.

And, having demurred in the exercise of the singular privilege and responsibility, there is no one else to take it on.

That means, not the state, not the community collectively, nor any agent on its behalf, nor anyone else not invested as a *certified aggrieved survivor* may step in. Why?

The "anyone else" is easy enough to explain. The system, just as it stands, already has this figured out. There are members of the community who might pretend to the status of aggrieved survivor and would jump at the license to kill.

But why not the state in all its celebrated impartiality? Because of that very impartiality. Either it has it or it does not. Here's what it would mean to have impartiality: then moral outrage would not become it. The notion of *lex talionis*—devised as it was to fit the nervous system of individual members of a biological species—is out of place applied to an abstract community which has no nervous system though it may have predictable patterns of behavior that have metaphorically, sometimes, appropriated the idea of a *mass psychology*. The notion that a collective may have a "soul, " a psyche, may be a useful way to compass the behavior of aggregates of individuals, but one thing it does not import from its original application to individuals is *moral responsibility*. Whole groups cannot be held responsible for what they do. Individuals in the groups can, *as private corporations and nation states have long ago figured out.* The group designates such individuals. In ancient rituals, individuals were picked out for sacrifice for precisely this reason. If Aztec Gods demanded a still-beating heart ripped from the chest of a chaste and hapless virgin, it was because the whole culture can never bring itself to sacrifice itself: exactly what this individual is able to do for it. *This individual is sacrificed so*

that the system may live. That is exactly what happens now when our legal system countenances the "isolated" execution of innocents. The method of selecting who will be sacrificed is, at best, only slightly more rational. Lip is paid service.

When innocents are sacrificed under current systems of "justice" no one pays. No one *has* to pay. *But that is as far from a moral view of the human world as we can imagine.* Natural forces kill without discrimination daily. The communities we create aspire to this level of adiaphorousness. Whole nations may kill with impunity just as tornadoes, typhoons and earthquakes. Their only checks are other aspirants, other nations… in all this morality goes begging. A community puts this one to death because in its best judgment what he has done is, in an *individual*, intolerable. Only nature and the state may kill with impunity.

Jessy Ellenberger, *Barbie in her e-chair*

But while this is true, the state is not driven to kill, unlike an individual *in extremis.* It may demur and yet survive because it has no nervous system and it has other resources at its disposal that the individual does not. It may protect its existence by *corrigible* incapacitation such as definite or indefinite confinement. *For all the difference it can make to the state, this is adequate.*

Or, if it *is* driven to kill, it is so because it is not abstracted enough from the vagary of individual nervous systems. It is a flawed state, one that does not do what a state is supposed to do for its constituents: filter individual passions through its concern for long term tenability of institutions. If it stifles these passions, it is to increase opportunities for indulging others, less destructive of its end of survival. This is not a *moral* impulse, survival. It scarcely needs help from that direction. The state is morally neutral, like a pleasantly sunny day or a natural catastrophe. Or, if we want to speak of these as good and bad, it is a matter of art, not ethics. It is a matter of decorum. The state couldn't be moral if its very survival depended on it. Fortunately for it, it never does. *Who needs morality when you've got power?*

If the state bows to the will of the people when the will of the people merely comprises the whim or outrage of the people, unfiltered through prudence and sustainability, when it could easily have defused these passions with its powers of obfuscation and outright confoundment (if not through opportunities for edification) that no state worthy of the name is without, then it has been hijacked. Most states, most of the time *are*.

But, aside from promoting its own survival, canny or not, there is a constructive role the state *may* play. Insofar as individuals, who are morally obligated (*unlike* states), may shape the policies of their states and communities, they should urge them to play it. The state should do

what it with its resources may do best: ascertain its best approximation of guilt in crime in order to protect its citizens with the least moral overhead. Since, as a well-behaved state should know, it, itself, is not *morally* responsible, when moral responsibility is in the balance, it must defer to those who indeed may be, that is, individuals.

When an individual has made himself so (ir)responsible that he deserves execution, a morally responsible individual (usually a different one), if there is any sufficiently driven to see that the morally right thing gets done, should carry it out. If there isn't such a person, the morality of the scene shall have to go wanting. Morality is the responsibility of individuals after all. What the state may not do is compound the moral enormity of a situation which is, in the first instance, not its proper business.

If there is such a person, the state will do its part to circumscribe a forum and an occasion for the enactment of *a ritual of moral responsibility. If error occurs, the state having done all it could to prevent it, it will be the privilege of another autonomous individual to continue the ritual and so on until the blood lust of individuals is sated.* (States don't have "lusts.") In this way the state performs its edificational role, the only salutary one it may assume in this matter.

Perhaps, it is not too much to hope that in the fullness of time autonomous
individuals may learn wisdom this way. But whatever education awaits their sentiments, a state will never have more than prudence to concern itself with.

The execution of Mata Hari

Afterward by the editor

This piece is taken from Bianco Luno's 2009 blog post, entitled "On being blotted out: the point of the death penalty," and slightly revised by the author.

Luno claims that if we are retributivists, every innocent life willfully and unnecessarily taken incurs a cost, the highest cost, which *only* an individual may pay. No exceptions. Since corporate entities, such as states, cannot (or will not) destroy or dissolve themselves when they bring about such deaths, they must either abstain from the penalty altogether and thereby demur on retributivism, or offer a system where qualified individuals may voluntarily put "skin in the game." No one could be "better" motivated to be an executioner than *a certified aggrieved survivor of the victim*. The lottery of a justice system that caters to retributive impulses will then at least have a claim to moral consistency. *It does not now.* (Luno dismisses non-deontological moral arguments for the penalty, such as deterrence, as not worth considering.)

Luno assumes here, and argues elsewhere, that corporate entities, which includes states, are fundamentally amoral precisely because they cannot be held meaningfully responsible. For that reason they have no business meting out death. The most they can do for a just cause is to inform those individuals who *may*, in their own right. Freighted with *unmitigated* responsibility, only individuals may act morally. Or have their sentiments educated.

In the end, it is our epistemological limitation that excuses us from *having* to play a game of *moral hazard* where the lack of incentive to guard against risk protects us from consequences. With the appropriate incentive in place, doubt formerly hidden in the shadows of our conviction as to what is morally due may be coaxed out.

—Victor Muñoz

Readings

On punishment:

Hugo Adam Bedau, "Punishment" in the SEP, http://plato.stanford.edu/entries/punishment/ is a fine introduction to this topic in the philosophy of law.

Kevin Murtagh, "Punishment" in the IEP, http://www.iep.utm.edu/punishme/

For the death penalty:

Ernest Van den Haag, "Capital Punishment Saves Innocent Lives,"

http://faculty.polytechnic.org/gfeldmeth/19.cpsaveslives.pdf

Ernest Van den Haag's quick rebuttals to the objections to the death penalty:
http://web.mnstate.edu/gracyk/courses/phil%20115/vanDenHaag_on_capPunish.htm

Louis Pojman, "A Defense of the Death Penalty,"
http://rintintin.colorado.edu/~vancecd/phil1200/Pojman.pdf

Against the death penalty:

Hugo Adam Bedau, "Bentham's Critique of the Death Penalty,"
http://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=6388&context=jclc